76-136

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. .....

STATE OF CALIFORNIA,

Respondent,

vs.

RICHARD RIOS HERRERA,

Appellant.

On Writ of Certiorari to the Appellate Department of the Superior Court, County of Orange, State of California.

PETITION FOR WRIT OF CERTIORARI.

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STATE OF CALIFORNIA,

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vs.

RICHARD RIOS HERRERA,

Appellant.

On Writ of Certiorari to the Appellate Department of the Superior Court, County of Orange, State of California.

PETITION FOR WRIT OF CERTIORARI.

The petitioner, Richard Rios Herrera, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court, County of Orange, State of California, confirming the conviction of the petitioner in the Municipal Court, Central Orange County Judicial District, County of Orange, State of California, from which conviction petitioner appealed. Judgment confirming the conviction was entered on June 1, 1976, in the Appellate Department of the Superior Court of Orange County, State of California.

No Further Appeal to State Courts.

The Division of Appellate Department of the Superior Court on Appeal from judgment of Municipal Court is not appealable to a higher state court. (Section

4, Article VI of the Constitution of the State of California; *McLean v. Freiberger,* 215 Cal. 1, 7 P. 2d 1023; *Unemployment Reserves Com. v. St. Francis Homes Assoc.,* 58 Cal. App. 2d 271, 137 P. 2d 64.)

The Appellate Department of the Superior Court of Orange County, State of California, rendered a three to none decision affirming the conviction of Appellant in Municipal Court of the Central Orange County Judicial District, Orange County, State of California, for the misdemeanor offense of violation of Section 11550 of the Health and Safety Code of the State of California (use/influence of an opiate).

Jurisdiction.

The judgment of Appellate Department of the Superior Court, County of Orange, State of California, was filed June 1, 1976. This Petition for Writ of Certiorari is filed 90 days of that date and is therefore timely filed. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3). See, *e.g., Gilbert v. California,* 288 U.S. 263, 265 (1967); *Parker v. Gladden,* 385 U.S. 363, 364 (1966).

There was no opinion filed by the Appellate Department of the Superior Court of Orange County, State of California, in confirming the conviction of the appellate in the Municipal Court of Central Orange County Judicial District, Orange County, State of California. The issues upon which the appeal was based involved only the Federal issues of cruel and unusual punishment and unequal protection of the laws under the provisions of the United States Constitution. It will be presumed that the State Court based its opinion on Federal grounds, and the U.S. Supreme Court will take jurisdiction, if the State ground was not a substantial or

sufficient one for the decision. *Williams v. Kaiser,* 323 U.S. 471, 89 L.Ed. 398.

Questions Presented.

1. Does Section 11550 of the California Health and Safety Code which provides for a mandatory jail sentence of 90 days for anyone under the influence of a restricted drug (if he is unable to prove it was obtained through an authorized prescription) constitute cruel and unusual punishment and thus invalid under the Eighth Amendment of the United States Constitution and the Fourteenth Amendment of the Constitution?

2. Is a statute effective under the equal protection clause of the United States Constitution, where a victim of a seller of narcotics, is required to serve a mandatory 90-day jail sentence without any chance of probation, while others involved in narcotics under similar circumstances may obtain probation?

Statement of the Case.

On May 20, 1975, a Complaint was filed in the Municipal Court of Central Orange County Judicial District, County of Orange, State of California, charging defendant and appellant with having committed on May 17, 1975, in the County of Orange the misdemeanor offense of violation of Section 11550 of the Health and Safety Code of the State of California (use/influence of an opiate). Thereafter on September 12, 1975, a Notice of Motion to Suppress Certain Evidence was filed by Defendant's Attorney, John Hart. The Motion was heard on September 17, 1975, in Division I of the above entitled Court. On September 29, 1975,

the above entitled cause was set for trial in Department 8 of said Court, the Honorable Eugene C. Langhauser, Judge presiding, with a jury, and the case was actually tried September 29, 30, and October 1, 1975. Defendant, Richard Rios Herrera, was present and represented by his counsel, John Hart, and the People of the State of California were represented by the District Attorney of Orange County, Cecil Hicks, by his Deputy, Pat Geary.

Said cause having been heard, evidence having been presented pursuant to the Stipulated Settled Statement in Lieu of Transcript on file herein, the case was submitted to the jury for verdict, after instructions on the law by the Court. The jury rendered a verdict of guilty. Thereafter, the Court sentenced the defendant and appellant to serve one (1) year in the Orange County Jail.

On November 26, 1975, Myerson & Willson were substituted as Attorneys for defendant in the place of John Hart.

On November 26, 1975, Notice of Appeal from the judgment rendered against defendant was filed herein.

On December 8, 1975, Petition for Relief from Default and for Extension of Time to Remand Record was filed with the Appellate Department of the Superior Court, County of Orange, State of California.

On December 18, 1975, hearing on the Motion to be Relieved from Default and to file Settled Statement was heard by the Honorable Court and the Motion to be Relieved from the Default was granted and the case ordered remanded to the Municipal Court, Central Judicial District of Orange County for further

proceedings and permitting the appellant to file a proposed Settled Statement.

On February 17, 1976, hearing was had on the Settled Statement on Appeal in Department 2 of the Municipal Court of Central Orange County Judicial District before the Honorable Eugene C. Langhauser, Judge presiding, and the Stipulated Settled Statement in Lieu of Transcript was filed herein; and on March 11, 1976, the record on appeal in the above captioned case was filed in the said Appellate Department of the Superior Court.

Appellant's Opening Brief was to be filed by March 26, 1976, however, the Court granted an extension of time to the filing of Appellant's Opening Brief until April 6, 1976.

After sentencing by the Court the defendant and appellant was incarcerated in the Orange County Jail on November 7, 1975, and remained there until he was released on $10,000.00 bail pending appeal, after hearing in Division 2 of the Central Orange County Judicial District, before the Honorable Eugene C. Langhauser, on December 23, 1975, at 9:00 a.m., whereupon the Court issued its Order admitting defendant and appellant to $10,000.00 bail pending hearing and determination of his appeal herein.

Statement of Facts.

The only witness at the trial of this case was the witness for the People of the State of California, City of Orange Police Officer Falkenstein.

His testimony was that he had eight and one-half years experience as a Police Officer with the City of Orange Police Department. That he had been on

the Narcotics Squad for three and one-half years. He stated that his training in narcotics included a forty hour course in narcotics in the Orange County Sheriff's Office, taught by experienced narcotic officers of that agency and medical doctors; a twenty-four hour course in the Westminster Police Department taught by experienced narcotic officers of that agency; a twenty-four hour course conducted by the Federal Bureau of Narcotics and Dangerous Drugs, taught by experienced narcotic officers of that agency; and that he had also been an instructor at the narcotics course in the Westminster Police Department.

The testimony of Officer Falkenstein was that he had been assigned by his superiors to work the "plain clothes" officer at Harte Park in the City of Orange on May 17, 1975, for the purpose of engaging in surveillance of the public for general law violations such as gambling, narcotics, vice, etc. He was assigned to this watch with another officer, Kogh, from the City of Orange Police Department.

Officer Falkenstein testified that while patrolling the grounds he observed the defendant and appellant, Richard Rios Herrera, and one Benjamin Peralta, both of whom the Detective knew from previous contacts. As the appellant and Peralta came closer to the Detective, Peralta engaged Detective Falkenstein in conversation. At the same time, appellant shifted his direction and began walking away from Detective Falkenstein. The Officer said "Hi, Richard" to appellant, in response to which appellant merely nodded and continued walking rapidly away.

Shortly thereafter, the Officer observed the defendant and appellant, Richard Rios Herrera, standing at a "Corn on the Cob Stand" at the Harte Park May Festival. The Officer then proceeded to a point where the defendant was standing and ordering a corn on the cob from the sales person at the stand. The Officer was standing beside the defendant and appellant and the appellant turned and at that time the Officer noticed that the appellant's eyes were the size of a pinpoint, to spite the fact that it was almost dark and no bright lights were present. The Officer heard the defendant talking to the proprietor of the corn stand and found the appellant's speech to be slow. Attorney for appellant, John Hart, on cross-examination asked Officer Falkenstein whether or not, if the defendant and appellant, Richard Rios Herrera, would have left the scene at this time, would the Officer have let the appellant go. The Officer said "No."

The Officer had defendant go to where a portable toilet was located in Harte Park for the May Festival, and there he found puncture marks on both of the defendant and appellant's arms. One mark on the left arm had blood and a white substance on it and appeared to the Officer to be less than twenty-four hours old. Appellant's pupils appeared to be constricted and fixed and his hands were cold and clammy.

At that point, appellant and defendant was arrested for violation of Health and Safety Code Section 11550 and transported to the Orange Police Department. At that location a chart was made of the marks on the

appellant's arms. An enlarged facsimile of the chart was received in evidence at the trial. Again, the Detective Falkenstein examined appellant's eyes with a flashlight and found the pupils to be constricted and fixed. Appellant declined to give a urine sample. His hands were cold and clammy and he was beginning to nod off. No photographs of the puncture marks were taken. No doctor was called to examine the defendant and appellant at any time.

The Detective Falkenstein further testified that when he observed the appellant at a portable toilet at Harte Park that the appellant was weaving and nodding as he observed him. The attorney for appellant on cross-examination asked this Detective if the fact that the appellant's pupils were pinpointed at this time and he was weaving and nodding were set forth in the police report. The Officer admitted that they were not on the arrest report.

Further, the defendant's attorney, John Hart, on cross-examination asked the Officer if he had used a measuring device to measure the pinpointed or constricted pupils of the appellant's eyes. The Officer replied "no", that he did not need it as he was qualified to testify to his observation of the appellant's pupils.

The defendant and appellant's attorney, John Hart, on cross-examination asked Detective Falkenstein if he had taken any photographs of the marks on the appellant's arms. The Officer testified that he did not need to do that because his observation was sufficient.

This Detective testified that the puncture wounds leave a red spot around the wound caused by bruising when the puncture is made. He testified that during his course in narcotics, he observed heroin used under supervision, thus enabling him to determine when such an opiate had been used.

This Detective testified that based upon his experience he was of the opinion that the mark that was bleeding on the appellant's arm was under twenty-four hours old. He also testified that although the mark appeared to be less than twenty-four hours old, he could not be more specific as to its age.

There were no other witnesses called by the People to testify in this case. There were no other witnesses called by the defendant and appellant's attorney, John Hart, to testify in this case on behalf of the appellant. The appellant and defendant did not testify himself. The People introduced a diagram showing a rough sketch of the appellant's right upper forearm and left upper forearm which diagram was introduced and marked Exhibit 1 for the People. The defendant and appellant did introduce a rough diagram showing two concentric circles with a square box on the right side of the diagram were the words "corn stand" was written, which diagram had been drawn by Detective Falkenstein, and this was marked Exhibit A for the defendant and appellant.

There was no other evidence, either oral or documentary, introduced by the plaintiff, People of the State of California, or by the defendant and appellant, Richard

Rios Herrera, and after argument by counsel the case was submitted to the jury for verdict, after instructions on the law by the Court.

Constitutional Provisions Involved.

1. Eighth Amendment of the United States Constitution.

> "Excessive bail shall not be required, no excessive fine imposed nor cruel and unusual punishments inflicted."

2. Fourteenth Amendment of the United States Constitution, Section 1.

> "All persons born or naturalized in the United States of America and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

Section 11550 of the California Health and Safety Code which provides for a mandatory jail sentence of 90 days for anyone under the influence of a restricted drug, if he is unable to prove it was obtained through an authorized prescription, is cruel and unusual punishment and invalid under the Eighth Amendment of the United States Constitution and the Fourteenth Amendment of the Constitution.

Section 11550 of the California Health and Safety Code provides as follows:

> "Health and Safety Code Section 11550 prohibited using or being under the influence of controlled substance:
>
> Burden of Defense: Misdemeanor offense and term of imprisonment. Probation."

> "No person shall use, or be under the influence of any controlled substance which is specified in Paragraphs (10), (11), (12), or (17) of Sub-division D of Section 11054, or specified in Sub-division (b) or (c) of Section 11055, or (2) which is a narcotic drug classified in Section III, IV, or V, excepting when administered by or under the direction of a person licensed by the State to dispense, prescribe or administer controlled substances. It shall be the burden of defense to show that it comes within the exception. Any person convicted of violation of any provision shall be sentenced to serve a term of not less than 90 days nor more than one year in the County Jail. The Court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases

> in which probation is granted require as a condition thereof that the person be confined in the County Jail for 90 days. In no event does the Court have the power to absolve a person who violates this Section from the obligation of spending at least 90 days confinement in the County Jail."

This Section is absolute in a 90 day jail sentence on a person under the influence of a controlled substance as set forth in the Code, and the last paragraph states, "In no event does the Court have the power to absolve the person who violates this Section from the obligation of spending at least 90 days confinement in the County Jail." Within the framework of this Section a person can be conducting himself in a perfectly lawful manner, as in the instant case, to wit: ordering a corn on the cob at a May Festival, and because of his bodily condition be arrested and required to spend 90 days in jail. This could be the case even if one was forceably placed under the influence of a controlled substance. This statute does not couple being under the influence with any other activity, *i.e.*, driving a motor vehicle or being in a public place.

The condition of the Appellant resulting in his arrest is similar to chronic alcoholism. Thus a sickness that became chronic at some earlier period before the arrest of the Appellant and although originally a voluntary act or series of acts leading to the chronic condition, the Appellant was a victim of his chronic condition, which caused his arrest. It has been held that chronic alcoholism is a defense to the charge of public intoxication and is not itself a crime. *Easter v. District of Columbia,* 124 U.S. App. D.C. 33, 361 F. 2d 50 (1966). Also, it has been held if an intoxicated person is actually carried into the street by someone

else, he does not do the act himself, and he is entitled to acquittal. Where police carried a drunken man from his home, he was not guilty of being drunk in public. *Martin v. State,* 31 Ala. App. 334, 17 So. 2d 427 (1944).

If Officer Falkenstein had not known the Appellant from previous contacts and the Appellant had not merely nodded and walked away from the officer, there is nothing to indicate that the defendant did any overt act to constitute a crime, until the officer observed the Appellant's constricted pupils when defendant was ordering a corn on the cob at a May Festival. Defendant was arrested because of his bodily condition. This Court has previously held that a conviction for loitering and disorderly conduct should be put aside as being supported by no evidence whatsoever as the defendant did nothing. *Thompson v. Louisville,* 36 U.S. 199 (1960).

Section 11721 of the Health and Safety Code which was the predecessor of the present Section 11550 of the Health and Safety Code of California, was found in *Robinson v. California,* 370 U.S. 660, to be unconstitutional as cruel and unusual punishment, where a misdemeanor was punishable by imprisonment when a person was addicted to the use of narcotics. The California Legislature thereafter reenacted the old statute eliminating the words "or to be addicted to the use of narcotics". This Court stated in the *Robinson* case at page 667

> "we hold that a State law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotics drugs within the State *or been guilty of any irregular behavior inflicts cruel and unusual punishment in violation*

> *of the Fourteenth Amendment*. To be sure, imprisonment for 90 days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison could be cruel and unusual punishment for the 'crime' of having a common cold". (Italics added for emphasis).

This Court has observed that it is not the amount of punishment that is concerned in a violation of the Constitutional Provision against cruel and unusual punishment, but it is the matter of degree when compared to the type of unsocial behavior committed by the accused person. It is submitted that the Appellant did nothing of an anti-social nature when observed and detained by Officer Falkenstein. The only thing the arresting officer noticed concerning the appellant that was different from other persons attending the May Festival in the City Park, was that the pupils of his eyes were constricted.

Since the *Robinson* case the Supreme Court has delved further into the question of whether or not, status can be a crime. Although, in *Powell v. Texas,* 392 U.S. 314 (1967), the majority of the Court did not find being a chronic alcoholic was a complete defense to drunkness, a strong descending opinion on page 370 stated:

> "The findings in this case read against the background of medical and socialogical data to which I have referred, compelled the conclusion that the infliction upon the Appellant of a criminal penalty of being intoxicated in a public place would be cruel and inhuman punishment with the prohibition of the Eighth Amendment".

In the instant case, the Appellant is not only guilty of a crime but is required under the California Statute to mandatorily be incarcerated in jail for 90 days without any opportunity of the lower Court granting probation to the accused.

1. Defendant Was Denied Equal Protection Under the Law as No Person Shall Be Subject to a Greater or Different Punishment Than Another in Similar Circumstances.

Under Section 11359 of the Health and Safety Code of the State of California, unlawful possession for sale of restricted drugs and narcotics, and also Section 11360 of the Health and Safety Code, unlawful transportation or sale of restricted drugs or narcotics, it is possible under the proper circumstances for the Court to give a defendant probation on a first offense. (11370 of the California Health and Safety Code, when probation or suspended sentence prohibited: prior conviction.) This is so even considering that a violation of either of these Sections of the Health and Safety Code is a felony. Is a statute effective under the equal protection clause where a victim of seller of narcotics, is required to serve a mandatory 90 day jail sentence without any chance of probation, while a seller could get probation? A statute which provided that convicted defendants sentenced to imprisonment must reimburse the State for furnishing of free transcripts of their trial by having amounts deducted from prison pay, denied such persons equal protection when it did not require reimbursement of those fined, given suspended sentences or placed on probation. *Rinaldi v. Yeager,* 384 U.S. 305 (1966).

This is not a recidivist statute involving any second offense or previous conviction of a crime, but rather,

this Section 11550 of the Health and Safety Code provides a mandatory 90 day jail sentence upon conviction of even a first offender. It is contended that this statute when taken into consideration with the other statutes pertaining to the sale and use of narcotics, results in an unequal protection of the laws to the Appellant, when a seller of narcotics can get probation and the purchaser is required to spend 90 days in jail without any chance of probation.

In *Yick Wo v. Hopkins,* 118 U.S. 356, this Court held in a suit involving the Constitutionality of Ordinance made by the City of San Francisco to regulate laundries, which Ordinances caused discrimination to the Chinese operating laundries, that this Court will put its own independent construction upon such Ordinances. Thus where the actual operation of the Ordinances resulted in unequal and unjust discrimination, it was held to be a violation of the Fourteenth Amendment in that there was a denial by a State of equal protection of the law. *Yick Wo v. Hopkins,* page 373.

Conclusion.

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted. Petitioner will hereinafter submit to this Court the certified record of the record on Appeal in the Appellate Department of the Superior Court, County of Orange, State of California, which record will reflect the Statement of the Case and Statement of the Facts set forth in this Petition.

Respectfully submitted,

DAVID SILVERTON,
Attorney for Petitioner,
Richard Rios Herrera.

ROSS WILLSON,
Of Counsel.

APPENDIX.

Notice of Filing Judgment.

Superior Court of the State of California for the County of Orange.

The People of the State of California, Plaintiff vs. Richard Rios Herrera, Defendant. No. AP-1997, Muni. Ct. No. 405603.

To: Cecil Hick, District Attorney, P.O. Box 808, Santa Ana, CA. Myerson & Willson, Attorneys at Law, 621 S. Harbor Blvd., Anaheim, California 92805; Hon. Eugene C. Langhauser, Central Orange County Judicial District, 700 Civic Center Drive West, Santa Ana, California 92702.

You and each of you will please take notice that in the above entitled matter Judgment was filed in this office on the 1st day of June 1976, a copy of which is attached hereto and made a part of this notice.

Dated: June 1, 1976.

WILLIAM E. ST. JOHN, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Orange.

By K. M. Owens
K. M. Owens, Deputy
Appellate Division

CERTIFICATE OF MAILING

I, the undersigned, a Deputy Clerk of the Superior Court of the State of California for the County of Orange, and not a party to the within action hereby certify: That on June 1, 1976 I served the foregoing notice on the parties whose names first appear hereinabove, addressed as therein shown, by depositing true copies thereof inclosed in sealed envelopes with postage thereon fully prepaid in a United States Postal Service mail box at Santa Ana, California.

Dated: June 1, 1976.

K. M. Owens
Deputy Clerk
Appellate Division

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff(s) and Respondent, vs. Richard Rios Herrera, Defendant(s) and Appellant. No. AP-1997.

Entered in the Register of Actions on June 1, 1976. W. E. St. John, County Clerk, by K. M. Owens, Deputy.

Filed: June 1, 1976.

On Appeal from the Municipal Court of the Central Orange County Judicial District, Hon. Eugene C. Langhauser, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment of conviction, Health and Safety Code §11550 made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby affirmed.

The cause is remanded to the Municipal Court for further proceedings.

Dated this 1st day of June, 1976.

/s/ Speirs
SPEIRS,
Judge

/s/ Turner
TURNER,
Judge

/s/ Charamza
CHARAMZA,
Presiding Judge